

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
May 25, 2006 Session

**JOHN FLOYD HOWELL, JR. v. REBECCA MOSELEY HOWELL**

**Appeal from the Circuit Court for Davidson County  
No. 00D-678 Muriel Robinson, Judge**

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**No. M2005-01262-COA-R3-CV - Filed on June 28, 2006**

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This appeal concerns Husband's efforts to reduce his alimony *in futuro* obligation following a twenty-two year marriage. Less than one year after the final decree of divorce, Husband's job was eliminated and he sought alternative employment. However, Husband incurred a significant reduction in compensation at his new job and thus he petitioned the court for a modification of spousal support. Wife counter-petitioned for arrearage and contempt asserting that Husband had ceased paying alimony and child support. Upon finding that a substantial and material change in circumstances had occurred, the trial court reduced Husband's alimony payment. However, the court also found Husband in civil contempt for willful failure to pay alimony and child support. The court denied Husband's request for a retroactive reduction in alimony and entered a judgment against him for alimony arrears. Husband appealed. The judgment of the trial court is affirmed in part and reversed in part and remanded.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,  
Reversed in Part and Remanded**

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Karla C. Hewitt, Nashville, Tennessee, for the appellant, John Floyd Howell, Jr.

Marlene Eskind Moses and John D. Kitch, Nashville, Tennessee, for the appellee, Rebecca Moseley Howell.

**OPINION**

Mr. John Howell ("Husband") and Ms. Rebecca Howell ("Wife") were divorced on December 17, 2001, after twenty-two years of marriage and two children. At the time of divorce, Husband earned \$200,000.00 per year while Wife earned \$15.00 per hour working at Cheekwood Horticultural Society. The court awarded Wife alimony *in futuro* and child support and agreed to Husband's elaborate sliding scale approach to payment. The marriage dissolution agreement filed on December 6, 2001, provided:

**3. ALIMONY IN FUTURO.** The Husband shall pay to the Wife a sum of alimony *in futuro* (which is intended to terminate on Wife's death or remarriage) on the first (1<sup>st</sup>) and fifteenth (15<sup>th</sup>) of each month in equal portions. Beginning December 1, 2001, the Husband shall pay to the Wife the sum of One Thousand One Hundred Dollars (\$1,100.00) on the first (1<sup>st</sup>) and One Thousand One Hundred Dollars (\$1,100.00) on the fifteenth (15<sup>th</sup>) and each month thereafter, for a total amount of alimony *in futuro* of Two Thousand Two Hundred Dollars (\$2,200.00) per month through December 31, 2003.

Beginning January 1, 2004, the Husband shall pay to the Wife the sum of One Thousand Five Hundred Dollars (\$1,500.00) on the first (1<sup>st</sup>) and One Thousand Five Hundred Dollars (\$1,500.00) on the fifteenth (15<sup>th</sup>) and each month thereafter, for a total amount of alimony *in futuro* of Three-Thousand Dollars (3,000.00) per month through July 31, 2004.

Beginning August 1, 2004, the Husband shall pay to the Wife the sum of Two Thousand Dollars (\$2,000.00) on the first (1<sup>st</sup>) and Two Thousand Dollars (\$2,000.00) on the fifteenth (15<sup>th</sup>) and each month thereafter, for a total amount of alimony *in futuro* of Four Thousand Dollars (\$4,000.00) per month through July 31, 2005.

Beginning August 1, 2005, the Husband shall pay the Wife the sum of One Thousand Eight Hundred Seventy-Five Dollars (\$1,875.00) on the first (1<sup>st</sup>) and One Thousand Eight Hundred Seventy-Five Dollars (\$1,875.00) on the fifteenth (15<sup>th</sup>) and each month thereafter, for a total amount of alimony *in futuro* of Three Thousand Seven Hundred Fifty Dollars (\$3,750.00) per month through July 31, 2006.

Beginning August 1, 2006, the Husband shall pay to the Wife One Thousand Seven Hundred Fifty Dollars (\$1,750.00) on the first (1<sup>st</sup>) and One Thousand Seven Hundred Fifty Dollars on the fifteenth (15<sup>th</sup>) and each month thereafter, for a total amount of alimony *in futuro* of Three Thousand Five Hundred Dollars (\$3,500.00) per month through July 31, 2007.

Beginning August 1, 2007, the Husband shall pay to the Wife the sum of One Thousand Five Hundred Dollars (\$1,500.00) on the first (1<sup>st</sup>) and One Thousand Five Hundred Dollars (\$1,500.00) on the fifteenth (15<sup>th</sup>) and each month thereafter, for a total amount of alimony *in futuro* of Three Thousand Dollars (\$3,000.00) per month through September 30, 2013.

After the Husband's obligation to pay Three Thousand Dollars (\$3,000.00) per month as alimony *in futuro* terminates, which will be on September 30, 2013, the Husband shall pay to the Wife the sum of One Thousand Dollars (\$1,000.00) on the first (1<sup>st</sup>) and One Thousand Dollars (\$1,000.00) on the fifteenth (15<sup>th</sup>) and each month thereafter, for a total amount of alimony *in futuro* of Two Thousand Dollars (\$2,000.00) per month until the Wife's death or remarriage.

Less than one year after the final decree of divorce, Husband's job was eliminated. Husband thereafter filed his first petition to modify spousal support which was resolved by agreed order entered on January 27, 2005, *nunc pro tunc* to June 23, 2003. The order reduced the amount of

Wife's alimony *in futuro* award and made other modifications to the terms of the original decree of divorce. On June 23, 2004, Husband filed a second petition to reduce his alimony obligation. Wife filed a counter-petition for arrearage and contempt on September 14, 2004, asserting that Husband had ceased paying alimony in November 2003 and child support in May 2004.

At the time of the hearing on Husband's petition to modify support, Husband was employed at Cendant Corporation earning a base salary of \$50,000.00 per year with an opportunity for bonuses. He had also sold two of his rental properties for net proceeds in the amount of \$70,000.00. However, his net worth had been significantly lowered since the time of divorce. Wife had continued working at Cheekwood Horticultural Society earning \$18,000.00 annually and she had bought eight rental properties with a realized income of \$9,196.00 per year. Wife had also sold the marital home for net proceeds in the amount of \$128,000.00 and her net worth had increased from \$200,000.00 at the time of the divorce to \$619,255.00.

At the hearing on January 27 and 31, 2005, the court found that (1) Husband was gainfully employed up until February 1, 2005, and that he had assets available to pay Wife alimony and child support; (2) a retroactive reduction of Husband's alimony obligation was not warranted; and (3) Husband's failure to pay constituted willful civil contempt. The court then entered a judgment against Husband in the amount of \$48,127.00 including pre-judgment interest for alimony arrears, of which he would pay \$500.00 per month. In order to purge himself of contempt of court, Husband paid \$12,300.00 to Wife, which included the balance owed on the child support arrears. Finally, the court reduced Husband's alimony obligation to \$2,750.00 per month in addition to the \$500.00 alimony arrearage payment.

Husband appeals claiming that the trial court erred in (1) failing to reduce Wife's alimony award to an amount commensurate with his ability to pay and Wife's need and ordering an arrearage payment in the amount of \$500.00 per month; (2) failing to apply the alimony reduction retroactively to the date of filing the petition to modify; and (3) awarding Wife attorney's fees. Wife seeks her attorney's fees for the appeal. The Supreme Court of Tennessee has clearly set out the standard for reviewing a trial court's decision to modify an award of alimony:

Because modification of a spousal support award is factually driven, a trial court's decision to modify its award is given wide latitude within the trial court's range of discretion. *See Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn.Ct.App.1999). A trial court abuses its discretion only when it " 'applie[s] an incorrect legal standard, or reache [s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.' " *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn.2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn.1999)). We shall presume the correctness of the trial court's factual findings so long as the evidence does not preponderate against them. *See Tenn. R.App. P. 13(d); Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn.2000). However, we review the trial court's conclusions of law under a de novo standard with no presumption of correctness. *See Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn.2001).

*Perry v. Perry*, 114 S.W.3d 465, 466-467 (Tenn.2003).

Husband first argues that because Wife substantially increased her net worth through the acquisition of eight rental properties since the time of the divorce, she is no longer financially disadvantaged. However, the record shows that despite Wife's recent property success, her realized income for 2004 was barely \$27,000.00. The court noted the apparent discrepancy in Wife's net worth and her realized income at the hearing on January 31, 2005, explaining:

The proof shows that wife has needed alimony, she doesn't – she still does not have the ability to earn the income that Mr. Howell does 'cause he can earn \$50,000, she can't.

Well, what she did was not part of the plan, but she was successful at what happened to her, based on Mr. Howell's non-performance on this agreement. But she's got a lot of rental property here that she's got to take care of. Some of it's not in the most desirable of areas here. She owes a lot of money on it. If she dies, her heirs are not going to be in [a] heck of shape, because there's not going to be any money, all this property would have to be sold, and that was not the plan that these parties asked this Court to approve.

So Mr. Howell has caused her a lot of trouble by reneging on this Marital Dissolution Agreement. She's had to change her lifestyle, she's had to sell her house, she bought this property, she has been somewhat successful with it. But the Petitioner's argument that this is \$900,000 worth of property looks good on paper, but it's not real life. The fact is that you've got mortgages on it, that you've got to keep it in good repair and it's a lot of work, that wasn't part of the plan here in their M.D.A. It was not part of the plan, the plan was reneged by Mr. Howell.

We therefore believe that the record supports the court's finding that Wife is financially disadvantaged as to Husband.

However, it is undisputed that Husband's monthly income was significantly reduced after the loss of his job. The record shows that at the time of the hearing to modify, Husband grossed \$4,166.67 per month. While we agree with the trial court that this significant reduction in income constituted a substantial and material change in circumstances, we disagree with the amount of the court's alimony reduction. The two most persuasive factors in determining a modification in spousal support are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn.2001). However, the trial court's decision to reduce Husband's monthly alimony payment to \$2,750.00 in addition to the \$500.00 monthly arrearage payment leaves Husband with an income insufficient to pay his personal expenses. We believe that a further reduction in alimony is necessary until Husband's financial situation improves, at which time, Wife may petition the court for an alimony modification. Therefore, we reduce Husband's alimony obligation to \$2,000.00 per month in addition to the \$500.00 monthly alimony arrearage payment.

Husband next argues that the trial court erred in failing to apply his alimony reduction retroactively to the date of filing the petition to modify. The decision whether to retroactively apply

a reduction in a support obligation to the date of filing the petition is within the sound discretion of the trial court. *Huntley v. Huntley*, 61 S.W.3d 329, 339 (Tenn.Ct.App.2001). In order to apply an alimony reduction retroactively, there must be a specific written finding by the court that the obligor's inability to pay was through no fault of his own and that a retroactive modification should be made in order to meet ends of justice. *Threadgill v. Threadgill*, 740 S.W.2d 419, 424 (Tenn.Ct.App.1987). However, the trial court made the finding in its May 5, 2005, final order that Husband's failure to pay was willful:

After having heard statements of counsel and testimony of witnesses, and after review of the pleadings, the proof introduced by the parties, and the entire record in this cause, the Court hereby makes the following findings:

1. That the parties were divorce[d] by Final Decree entered on the 17<sup>th</sup> of December, 2001, which incorporated a Marital Dissolution Agreement;
2. That Mr. Howell filed a petition to reduce his obligation to pay alimony *in futuro* to Ms. Howell on June 23, 2004;
3. That Ms. Howell filed a Counter-Petition for Arrearage and for Contempt on September 14, 2004;
4. That Mr. Howell failed to comply with the terms of the Marital Dissolution Agreement by failing to pay alimony to Ms. Howell for several months. Further, that during such time until February 1, 2005, Mr. Howell was gainfully employed and had assets with which to pay alimony to Ms. Howell in accordance with the terms of the Marital Dissolution Agreement;
5. That Mr. Howell failed to comply with the terms of the Marital Dissolution Agreement by failing to pay child support as Ordered;
6. That Mr. Howell had the ability to pay alimony and child support in accordance with the terms of the Marital Dissolution Agreement up until February 1, 2005 and that a retroactive reduction of Mr. Howell's alimony obligation is not warranted;
7. That Mr. Howell's failure to pay alimony and child support in accordance with the Final Decree of Divorce constitutes willful civil contempt of Court;

The trial court's finding that Husband purposefully failed to pay his alimony and child support obligations is amply supported by the record. Husband's testimony at the hearing on his petition to modify clearly showed that he had the means available to pay his court-ordered obligations:

- Q. Okay. You do own some rental properties, correct?
- A. Correct.
- Q. And in fact, up until recently, you owned three rental properties – well, four rental prop – properties, including the residence you live in, correct?
- A. Correct.
- Q. Okay. And you've recently sold two of those, correct?
- A. Yes.

Q. Now, describe the sales to The Court; how long have you had these properties up for sale?

A. The first property at 200 Bellmore Avenue I purchased approximately two years ago –

Q. Okay.

A. – and I sold it last month.

...

Q. And what net proceeds did you realize?

A. Approximately \$30,000.

Q. Okay. And you also sold –

THE COURT: Now, when did you get that \$30,000?

THE WITNESS: January 7th of '04.

THE COURT: 0-four?

THE WITNESS: No. Of '05, excuse me.

...

THE COURT: Your knew you were behind in your alimony; did you make any payments from that?

THE WITNESS: No, ma'am.

THE COURT: What did you do with the money?

THE WITNESS: I have over a hundred thousand in unsecured debts, I had property taxes on other properties that I had –

THE COURT: You paid other bills, in other words.

THE WITNESS: Yes, ma'am.

...

Q. Mr. Howell, did you receive net proceeds from the sale of another property?

A. I did.

Q. Which – which property?

A. Forty-four-o-nine Scenic Drive.

Q. How many – much proceeds did you receive from that?

A. Approximately \$40,000.

Q. And you are here today able and prepared to pay whatever The Court orders as an obligation for your arrearage?

A. If I have the money, yes.

Q. Okay.

THE COURT: So are you telling me you've got that \$40,000?

MS. HEWITT: Well, Your Honor, it's hard – it's hard – We have \$12,300 with us here, today. And –

THE COURT: What bills did he pay with this 40? Because he was under a court order for child support and alimony, and he's sitting up here telling me [he] paid other bills when he had the money in-hand to comply with this order –

MS. HEWITT: I believe –

THE COURT: – What did he do with that \$40,000?

Q. Okay. Mr. Howell, did you pay an equity line with that \$40,000?

A. Yes.  
 ...  
 Q. In 2003, you got a refund, too, didn't you, sir?  
 A. Yes.  
 Q. And that refund was \$9,438, wasn't it, sir?  
 A. It sounds right. If you've got the document there.  
 ...  
 Q. Now when you got that refund, you didn't pay any of it to Ms. Howell, did you, sir?  
 A. No.  
 ...  
 Q. In 2004, you withdrew \$32,000 from your Charles – Charles Schwab account, didn't you, sir?  
 A. From my I.R.A. account, yes.  
 Q. Yes, sir. You didn't give any of this money to Ms. Howell either did you?  
 A. No.  
 Q. November 15th, 2004, you withdrew \$10,000 from your American Express Annuity, didn't you, sir?  
 A. Yes.  
 Q. You didn't give any of that money to Ms. Howell.  
 A. No.

The court's finding is also supported by Husband's testimony concerning the personal obligations that he managed to pay despite his claim that his financial resources were insufficient to satisfy his alimony and child support payments. Husband testified:

Q. And this shows your charges at Hillwood Country Club for food; liquor; merchandise; golf; dues; is that correct?  
 A. Correct.  
 Q. Tennis tournament, those sort of things?  
 A. Uh-huh.  
 Q. And when we corrected a payment, it shows that your average – average monthly payment is \$569.80; is that correct?  
 A. Correct.  
 ...  
 Q. That car you had was a Jaguar; isn't that right, sir?  
 A. Nineteen-ninety-six, yes.  
 Q. And then you traded it in. And in order to trade it in, you put down a payment of \$10,596.39; is that correct, sir?  
 A. No, that is not correct.  
 Q. Well, you traded in your Jaguar for \$4,500 –  
 ...  
 A. Yes.  
 Q. And so the difference between those two numbers is what you paid?

- A. No. I didn't pay any money down. Those were – the rest of that there were discounts given to me by the dealerships, rebates –
- Q. So you financed the rest of it?
- A. I put \$4,500 down and the rest was financed via lease.
- Q. And you're paying \$396 a month; is that –
- A. Three hundred –
- Q. – correct?
- A. – and forty-eight a month.
- Q. Three-forty-eight a month.
- ...
- Q. All right. You have four Titans P.S.L.s; is that correct?
- A. Yes.
- Q. And you buy season tickets yearly –
- A. Yes.
- ...
- Q. And you gave your future wife a ring that costs \$5,000.
- A. Yes.

We therefore find that the trial court was well with its discretion in determining that Husband was not entitled to have his alimony reduction retroactively applied to the date of filing the petition to modify since the record clearly shows that Husband's failure to pay his alimony and child support obligations through February 1, 2005, was voluntary.

The final issue raised by Husband on appeal concerns whether the trial court erred in awarding Wife her attorney's fees. The decision to award attorney's fees in an alimony or child support enforcement action is within the discretion of the court. *Threadgill*, 740 S.W.2d at 426.

The plaintiff spouse may recover from the defendant spouse...reasonable attorney fees incurred in enforcing any decree for alimony and/or child support...both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

Tenn.Code Ann. § 36-5-103(c).

Husband argues that because he was successful in modifying his alimony obligation, it would be inequitable to punish him with the payment of Wife's attorney's fees. Although it is true that Husband ultimately prevailed in his petition to modify, the court also found him in civil contempt as a result of his willful failure to pay alimony and child support and for allowing his life insurance policy to lapse for non-payment of premiums. The applicable statute clearly allows for the award of attorney's fees to the prevailing spouse in an alimony and/or child support enforcement action. See Tenn.Code Ann. § 36-5-103(c). Since Wife prevailed in her counter-petition for arrearage and contempt, we cannot say that the trial court abused its discretion in awarding her attorney's fees.



Wife's sole contention on appeal is that she be awarded her attorney's fees for the appeal. Whether to award attorney's fees on appeal is within the discretion of this Court. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn.Ct.App.1995). Pursuant to Tennessee Code Annotated section 27-1-122, the Court may award attorney's fees against the appellant if the Court finds that the appeal was frivolous or taken solely for the reason of delay. Because Husband was partially successful on appeal, we cannot find that the appeal was frivolous and thus decline to award Wife her attorney's fees. The judgment of the trial court is affirmed in part, reversed in part and remanded. The costs of appeal are assessed equally between the parties.

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WILLIAM B. CAIN, JUDGE